It is also interesting to note that a large part of her oral evidence relates to the few overseas trips she made with the husband to attend the Association of Patent Attorneys conference. She even tendered two photographs to show that she and the husband were enjoying themselves and were very happy. It is true that the husband appeared to be in a happy mood. But from the evidence I accept the husband's explanation when he said, although the marriage had broken down, he had to put up a front as he would not like to wash dirty linen in public.

I shall now apply the legal principles set out earlier to the facts of this case. Apart from my clear impression that the wife showed a lack of understanding of the problems of her husband, I have reached a conclusion that she has not shown herself to be of such a character and personality and her behaviour has not been such that I can conclude that the husband can reasonably be expected to live with her. I therefore hold that the husband has satisfied this court of the fact in relation to this marriage as set out in para (b) of s 54(1) of the Law Reform Act.

As to the wife's second submission, namely, that the marriage has not broken down irretrievably, the wife says and undoubtedly believes that what is involved is a temporary difficulty attributable partly to a misunderstanding and partly to the temporary financial problem facing her husband which can be solved. The husband is adamant that the marriage is at an end and states with force and conviction in the witness box that there is no possibility of his contemplating living with the wife as her husband. As a matter of law, simple assertion either way cannot suffice. What the court has to do is to examine the whole of the evidence placed before it including, and giving not inconsiderable weight to, the assertions of the parties and determine whether it can be said that in spite of the behaviour of the wife and the reaction to that behaviour of the husband, the marriage has not broken down irretreivably. Doing the best I can and having regard to the manner in which the parties gave evidence in the witness box and the circumstances of this case, I am satisfied that the marriage has broken down irretrievably. That being my finding and bearing in mind the following passage from the Law Commission Report (Cmd 3123) on the 1969 English legislation at para 15:

> (i) To buttress, rather than to undermine the stability of marriage and (ii) when regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness distress and humiliation.

I have no alternative but to grant a decree nisi.

Petition allowed.

Solicitors: *Siva, Thurai, Mariany & Co; Shearn Delamore & Co.*

Reported by *Kevin Mathews*

Re Ismail bin Daud & Anor, ex p Universal Life & General Insurance Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D3-43-4873-88
VC GEORGE J
29 SEPTEMBER 1989

Bankruptcy — Bankruptcy notice — Sum demanded — Computation of amount — Interest on judgment debt included — Uncertainty or ambiguity in notice — Whether debtor misled — Duty of court and Official Assignee — Bankruptcy Act 1967, ss 3(1)(i), 3(2)(ii) & 131

A bankruptcy petition was presented by a judgment creditor on the ground that the two respondents had failed to comply with the bankruptcy notices that had been served on them. It was contended for the Official Aassignee that the bankruptcy notices were invalid and that accordingly the subsequent proceedings therefrom were a nullity. The date of each bankruptcy notice was 11 August 1988 and was based on a default judgment dated 20 May 1988. The objection was based on the ground that interest on the judgment was calculated only up to 30 June 1988 and that in respect of the period from 1 July 1988 to 11 August 1988 the amount of interest was not calculated and further that it was left to the judgment debtor concerned to calculate the amount albeit based on the formula set out in the judgment of 8% pa on the principal amount. It was contended that the judgment debtor having to find out by calculation what the interest payable was, made each of the notices invalid and that accordingly the petition was a nullity.

Held, dismissing the petition:

(1) If the amount specified in the notice is quantified or is quantifiable then, even if the amount demanded exceeds the amount actually due under such a notice, the notice will not per se be invalidated unless the debtor within the prescribed seven days gives notice to the creditor that he disputes the validity of the notice on the ground of the mistake. In the absence of a dispute by the debtor of the quantum, it is not for the court or the Official Assignee to question the quantum of the amount claimed in the notice.

(2) So long as the amount demanded is in accordance with the terms of the judgment or order and is quantifiable on the date of the notice, and all the ingredients necessary to so quantify the amount payable are provided in the notice without uncertainty or ambiguity, such a notice per se is not bad.

(3) Where in the body of the notice, to the ingredients for calculating the interest ordered, the words 'and continuing' or other words of like effect are appended, that could amount to the demand being uncertain and as such bad. Where in the body of the notice there are no such words but in the particulars appended to the notice those words appear and have the effect of giving particulars of the judgment or order on the basis of which the notice is given, that does not necessarily make the notice bad for uncertainty. What is relevant is what is demanded and if what is demanded is exact, then such a notice is not necessarily bad for uncertainty.

(4) In the instant petition the use of the words 'and still continuing' in respect of interest in the body of the notice and the words 'with further interest on $10,526.72 at the rate of 8% pa from 1 July 1988 to the date of final payment or of receiving and adjudication orders' in the particulars had the combined effect

of not making what was demanded clear and could even be said to have misled the recipient.

Cases referred to

1 *Ghazali bin Mat Noor* v *Southern Bank Bhd* [1989] 2 MLJ 142 (not folld)
2 *Low Mun* v *Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 (folld)
3 *Re A Debtor, ex p The Debtor* v *Scott & Anor* [1954] 3 All ER 74 (refd)
4 *Rengasamy Pillai* v *Comptroller of Income Tax* [1970] 1 MLJ 233 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(i), 3(2)(ii), 131

Muralee Menon for the petitioner.
Tengku Muzani for the Official Assignee.

Cur Adv Vult

VC George J: The instant matter is a bankruptcy petition which came on for disposal on 21 June 1989. The two respondents were duly served (albeit by substituted service) but were absent. They had, it would seem, ignored both the bankruptcy notices and the petitions. However when the petition was called, Tengku Muzani, representing the Official Assignee, drew the attention of the court to the bankruptcy notices on which the petition was based submitting that the notices were invalid and that accordingly the subsequent proceedings therefrom were a nullity.

The bankruptcy notices were each based on a default judgment dated 20 May 1988 by which the defendants were required to pay the sum of $9,491.43 together with interest thereon at the rate of 8% pa from the date of the judgment to date of payment and solicitor-client costs fixed at $950. The request for issue of the bankruptcy notice was filed on 11 July 1988 and the notice that was eventually issued was dated 11 July 1988. The portion of the notice referring to the amount to be paid within seven days of service of the notice was as follows:

> ... the sum of $9,491.43 and $85.29 for interest at the rate of 8% pa from 20 May 1988 to 30 June 1988 (and still continuing) and $950 costs claimed (by the plaintiff) as being the amount due on a final judgment obtained by (the plaintiff) against you ...

The notice goes on to give particulars of how the amount claimed was arrived at, viz:

(1)	Principal sum as per judgment dated 20 May 1988 in Summons No 82-778-88	$ 9,491.43
	Interest on $9,491.43 at the rate of 8% pa from 20 May 1988 to 30 June 1988 (41 days) (and still continuing)	$ 85.29
(2)	Costs of Action	$ 950.00
	Total	$10,526.72

With further interest on $10,526.72 at the rate of 8% pa from 1 July 1988 to the date of final payment or of receiving and adjudication orders.

The objection raised by the Official Assignee's representative was on the basis that the interest claimed is only calculated up to 30 June 1988 and that in respect of the period from 1 July 1988 to 11 August 1988, which is the date of each of the bankruptcy notices, the amount of interest was not calculated and further that it was left to the judgment debtor concerned to calculate the amount albeit based on the formula set out in the judgment of 8% pa on the principal amount. It was contended that the judgment debtor having to find out by calculation what the interest payable is, made each of the notices invalid and that accordingly the petition itself is a nullity.

Before considering whether there are merits in the complaint I pause to note that it is not clear in the notice up to what date the interest demanded was to be calculated.

Objections based on the validity of the relevant bankruptcy notices were taken on behalf of the Official Assignee in a number of other petitions (19 of them) called on the same morning as the instant petition was called.

In some of the 19 cases, the bankruptcy notices required the debtor to pay on top of the principal amount interest up to a fixed date, namely the date of the notice, to be calculated on the basis of the usual formula set out in the judgment on which the notice was based. In some others, the notice was similar to the notice in the instant case — the amount was calculated up to a fixed date (that was earlier than the date of the bankruptcy notice) and the words 'and still continuing' were appended to the said amount without any or any clear indication as to the date up to which interest had to be calculated and paid pursuant to the notice. In yet some other cases, the demand was for an amount that had been calculated up to some date prior to the bankruptcy notice and required that such amount be paid within seven days of receipt of notice. The 'particulars' as to how the amount was arrived at is given below the notice as an appendage to it wherein the formula for the calculation of interest as given in the judgment or order is set out and with the interest calculated on that basis until the said prior date and with the words 'and still continuing' added on against the said amount of interest. In some cases 'particulars' of how the amount was arrived at is not given.

The instant petition and all the 19 others were adjourned to 23 August 1989 on which date all the petitions were deemed to have been heard together using the instant petition as the lead case as it were, on the understanding that not only would the issues in the instant petition but all the issues in the other petitions as well would be disposed of as if they were issues in the instant petition. Submissions were made by Encik M Menon, counsel for the petitioners, and also by Dato' Rekhraj, Encik Benjamin Dawson and Encik Kingston Tan who were counsel in

some of the other petitions. Tengku Muzani, representing the Official Assignee, was also heard.

I understand that there are literally hundreds of other petitions now pending in the High Courts all over the country where it is contended that the bankruptcy notice is bad because, inter alia, the debtor had to calculate what the interest he had to pay was by applying the formula set out in the judgment or order on which the bankruptcy notice was based and/or because the words 'and still continuing' or other words to the like effect are set out either in the body of the notice or in the particulars appended thereto or because the 'particulars' of the breakdown of the amount claimed is not set out in the notice or appended to it.

The first observation to be made is that the format for the bankruptcy notice is prescribed as Form 5 to the Bankruptcy Rules 1969. It does not provide for particulars of the amount demanded to be given in the body of the notice or at all.

Encik Kingston Tan pointed out that a bankruptcy notice is issued not by the judgment creditor or his solicitors but by the court, on request, and the rules require and the practice in keeping with the rules is that the notice is prepared by the judgment creditor or his solicitors and submitted to the court with the written request for the same to be issued.

The relevant portions of s 3(1)(i) of the Bankruptcy Act 1967 provides that:

> A debtor commits an act of bankruptcy ... if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him ... a bankruptcy notice under the Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order ... and he does not within seven days after service of the notice ... comply with the requirements of the notice ...

The contention by Encik Kingston Tan in effect was that although the notice is prepared by the petitioner or his solicitors, since it is the court that dates and issues the bankruptcy notice, it is not possible for those preparing the notice to calculate the interest that is due as on the date of issue of the notice, not knowing when it would in fact be dated and issued.

It is clear that the express intention of the said s 3(1)(i) is that by the notice the judgment creditor is entitled to require the judgment debtor to pay the sum ordered to be paid in accordance with the terms of the judgment or order. To my mind it is equally clear that if interest is ordered to be paid the judgment creditor is entitled to ask for such interest as is due on the date of service of the notice. There is certainly no call for him to ask for something less than that.

However, since the person preparing the notice cannot know with certainty when the notice would be issued and since there is no way in which he could know when it would eventually be served, the only practical way in which the demand for what is due (where interest is also due) can be made is to set out in the notice the formula given in the judgment or order in respect of the payment of interest and stating that interest on the basis of that formula should be calculated up to the date of receipt of the notice and paid together with the principal amount ordered to be paid.

On 15 April 1989, the Supreme Court delivered its judgment in *Ghazali bin Mat Noor* v *Southern Bank Bhd*,[1] heard together with four other appeals on the same point. The issue was the validity of the bankruptcy notices that were issued and duly served in each of the cases. In the judgment of the Supreme Court, reference was made to an earlier judgment of the Supreme Court being its judgment in *Low Mun* v *Chung Khiaw Bank Ltd*[2] and various passages from *Low Mun*[2] were then referred to and the judgment concluded at p 143 of the report:

> For a bankruptcy notice to be valid, therefore, it should state the exact amount due as at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid bankruptcy. He does not have to make any calculations or enquiries. How the exact amount is arrived at should be particularized as follows:
>
> *Particulars of Amount Claimed*

Amount adjudged in the Sessions Court at Kota Bharu in Summons No 565 of 1985 dated 16 April 1986	$ 21,924.76
Interest at the rate of 8% pa from 1 October 1985 to 2 October 1986	$ 1,753.98
Costs	$ 685.00
Total	$ 24,363.74

> In the present appeals, the interest sums payable have not been quantified. The bankruptcy notices in all five cases are therefore invalid ab initio and consequently all subsequent proceedings to these bankruptcy notices are a nullity. For these reasons, we allowed the appeals with costs and set aside the orders made by the learned judge.

In *Ghazali*,[1] what the Supreme Court did was to purport to simply apply the ratio decidendi in *Low Mun*[2] to arrive at the said conclusion quoted in full here above and appeared to take the view that the ratio decidendi in *Low Mun*[2] is that in a bankruptcy notice nothing should be left for the debtor to calculate to know what he is required to pay.

It is also relevant to note that in *Ghazali*,[1] the suggestion appears to be that particulars of how the amount demanded is arrived at should be shown in the notice, and in showing how the exact amount is arrived at the judgment suggests that the judgment creditor is entitled to demand payment of interest calculated up to the date of the bankruptcy notice which in that case was 2 October 1986.

It seems to me that the attention of the Supreme Court in *Ghazali*[1] was not drawn to the practical problem

referred to herebefore of the judgment creditor or his solicitors having to prepare the notice which could be issued by the court at some later date than when it was prepared. In fact of the said 19 matters to be disposed of with the instant case in at least seven of them the bankruptcy notices were issued by the court well after the dates they were prepared by the judgment creditor or his solicitors (vide the request to issue bankruptcy notice and the bankruptcy notice issued in each of the petitions 43-8831-88, 43-9199-88, 43-7071-87, 43-5217-87, 43-2271-87, 43-7073-87 and 43-917-88). I pause to note that from inquiries made by me at the registries, I gather the position to be that while in some registries every endeavour is made to date the bankruptcy notices with the date they are received there is no such universal practice, and in any event they are not necessarily dated with the date on which they were prepared. An obvious situation when this has to happen is where the request and bankruptcy notice are sent in by post when as many as ten days could lapse between date of preparation and date of issue not to speak of the date of service of the notice on the judgment debtor.

It was Dato' Rekhraj who drew my attention to the fact that the format of the bankruptcy notice is prescribed by the Bankruptcy Rules 1969 which as has been seen is Form 5 therein and that neither the Rules nor the said format call for particularization of the amount claimed. He submitted that what *Ghazali*[1] states in respect of particularization of the claim goes beyond what the rules require the judgment creditor to do in causing a notice to issue.

Encik Benjamin Dawson urged the court to hold that a judgment debtor on whom a bankruptcy notice is served is not to be regarded as an imbecile and that the usual simple formula set out in judgments and orders for the calculation of interest ordered could be reproduced in bankruptcy notices without per se making them invalid. Encik Dawson argued with credible ingenuity that in spite of *Ghazali*[1] it would be in order for me to hold without running foul of the principles of stare decisis that even if a judgment debtor has to make a calculation before he knows what interest he has to pay such a bankruptcy notice is not necessarily bad. Largely based on the arguments advanced by Encik Dawson, I arrived at the following conclusions.

Low Mun[2] is authority for the proposition that where portions of the sums ordered to be paid cannot be ascertained, eg where the rate at which interest ordered to be paid is not known or where the costs ordered to be paid as taxed had not been taxed, a bankruptcy notice which demands payment of amounts which include unascertained amounts is a nullity ab initio. In my respectful opinion *Low Mun*[2] does not go so far as to say that where the rate at which the judgment debtor had been ordered to pay interest is known, requiring him to pay interest calculated at that specified rate until the date of or the date of the service of the bankruptcy notice, without the judgment creditor or the court doing the actual simple arithmetical calculation but leaving it to the judgment debtor to do so makes the notice bad. What was pointed out in *Low Mun*[2] was that:

> The bankruptcy notice in this case neither specified the bank's base lending rate on which the interest payable *should be calculated in accordance with the terms of the judgment* nor quantified the taxed costs. (Emphasis supplied.)

Further down in the judgment it is stated:

> Clearly the bankruptcy notice was bad in law as it contained demand for payment of the whole judgment debt within seven days when parts of the whole debt had not been or *could not be quantified* and as such were incapable of being made the subject of execution ... (Emphasis supplied.)

And still further down are these words:

> Consequently, we are of the view that when you have the judgment in the usual form that we have here, a bankruptcy notice under the Act must require payment of quantified sum or sums alleged to be due according to the terms of the judgment as at the date of issue of bankruptcy notice. The duty is on the creditor to state the correct amount due, and there is no obligation imposed on the debtor to make inquiries *if the amount demanded is ambiguous or unascertained.* (Emphasis supplied.)

The judgment ends with a reference to the opinion of Sir Raymond Evershed in *Re A Debtor, ex p The Debtor* v *Scott & Anor*[3] the last sentence of the quotation being:

> The requirement, in my judgment, is that the petitioning creditor's debt must also be shown to have existed and to have the necessary character and quality stated in s 4 at the date of the act of bankruptcy as well as at the dates of the presentation and hearing of the petition.

In respect of that, the *Low Mun*[2] judgment states:

> Applying these statements (from the Evershed judgment) to the present case, the current base lending rate of 10.25% and the taxed costs of $9,880.50 in the creditor's petition *cannot be read* into the bankruptcy notice. Thus, on the date of issue of bankruptcy notice, it could not be said of the judgment on the interest and the costs that they constituted a judgment debt presently payable to the creditor, for they had not been quantified into a liquidated sum.

It seems to me clearly what is meant is that because on the date of the issue of the bankruptcy notice the rate 10.25% and the costs at $9,880.50 had not been ascertained, what the judgment debtor was required to pay was not quantifiable and as such following the Evershed judgment it cannot be said that in respect of interest and costs there was a liquidated amount on the date of the notice that could be the subject of a bankruptcy notice.

What had happened in the *Low Mun* case[2] was that on the date of the issue of the bankruptcy notice the rate of interest was unascertained and the costs ordered to be paid as taxed had not been taxed. Reading the judgment in *Low Mun*[2] as a whole, in my respectful opinion, what in effect

it teaches is that the amount payable must either be quantified or all the necessary ingredients for quantifying it must be available to be and should be set out in the bankruptcy notice to enable the recipient of the notice to ascertain from such information what is to be paid. And with the greatest respect, in a judgment where interest is ordered to be paid in terms of the usual formula set out in judgments and orders, it is my view that in the light of the terms of s 3(1)(i) which provides for the notice to require the judgment debtor to pay the amount payable in accordance with the terms of the judgment or order and particularly as the rules provide that it is not the petitioner that issues the notice but that he is required to send in a prepared notice with the request for the issue of the same to the court for the court to issue it, and having in mind that the petitioner is entitled to require the judgment debtor to pay what is due to be paid as on the date of the service on him of the bankruptcy notice and in terms of the judgment or order on which the notice is based, he being given seven days after service of the notice to effect the payment demanded, *Low Mun*[2] cannot be read otherwise than that in the bankruptcy notice the amount payable must either be quantified or that all the ingredients necessary to quantify the amount payable in terms of the judgment on which the notice is based must be set out, which includes the formula for calculation of interest to be paid up to be calculated to a specified date not later than the date of the service of the bankruptcy notice.

Ghazali[1] then in my respectful view has to be regarded as being per incuriam or as providing a ruling on an issue on which there has been a different ruling by another panel of the Supreme Court, ie in *Low Mun*,[2] and accordingly it is open to a court subordinate to the Supreme Court to choose one or the other of the two Supreme Court rulings and with great respect and for the reasons given herebefore I would follow *Low Mun*.[2] As to particularization of the amount, the way it should be done, as suggested by *Ghazali*,[1] has to be understood to be no more than suggestions to emphasize (and it cannot be over-emphasized) that what the notice demands must not be ambiguous or uncertain. If the debtor is required to calculate the interest payable, each and every one of the ingredients to effect the calculation must be set out in the notice. If any one of the ingredients is not available or is in any event left out, then the notice is bad for uncertainty.

The other point raised by both Dato' Rekhraj and En Benjamin Dawson is the effect of proviso (ii) to s 3(2) of the Act which reads as follows:

> Provided that a bankruptcy notice —
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

I agree with counsel that if the amount specified in the notice is quantified or is quantifiable then even if the amount demanded exceeds the amount actually due such a notice will not per se be invalidated unless the debtor within the prescribed seven days gives notice to the creditor that he disputes the validity of the notice on the ground of the mistake. In the absence of a dispute by the debtor of the quantum, it is not for the court or the Official Assignee to question the quantum of the amount claimed in the notice. However, if what is claimed is not clear as opposed to being excessive it is, in my view, the duty of the court and of the Official Assignee to take note of such lack of clarity and inspect it in the light of s 131 of the Bankruptcy Act 1967 which is as follows:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

The policy of the Act is that the recipient of the bankruptcy notice must not be misled. In *Rengasamy Pillai* v *Comptroller of Income Tax*,[4] the Privy Council in its advice stated at p 236F:

> What then is 'a formal defect or irregularity' within the meaning of the section? This was discussed in relation to a bankruptcy notice in *In re a Debtor, ex p The Debtor* v *Bowmaker Ltd* [1951] 1 Ch 313 in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. It if was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If on the other hand it would not reasonably mislead the debtor it was a formal defect and validated by the section. Their Lordships are here only concerned with the application of the section to a bankruptcy notice. They are not concerned with whether the same test is appropriate to determine the validity of subsequent steps in bankruptcy proceedings. In their view any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it is served is a 'formal defect' and validated by the section.

None of the judgment debtors in all 20 matters before me are challenging the validity of the bankruptcy notice served on them. In the face of that and applying the test suggested and applied by the Privy Council in *Rengasamy Pillai*[4] where the judgment debtor cannot be said to have been misled, the suggestion that the bankruptcy notice is invalid because it seeks payment of more than is due or less than is due cannot be sustained.

Accordingly, with the three different types of notices referred to herebefore in mind, I hold that so long as the amount demanded is in accordance with the terms of the judgment or order and is quantifiable on the date of the

notice and all the ingredients necessary to so quantify the amount payable are provided in the notice without uncertainty or ambiguity such a notice per se is not bad.

I hold that where in the body of the notice, to the ingredients for calculating the interest ordered, the words 'and continuing' or other words of like effect are appended, that could amount to the demand being uncertain and as such bad.

I also hold that where in the body of the notice there are no such words but in the particulars appended to the notice those words appear and have the effect of giving particulars of the judgment or order on the basis of which the notice is given, that does not necessarily make the notice bad for uncertainty. What is relevant is what is demanded and if what is demanded is exact, then such a notice is not necessarily bad for uncertainty.

In the instant petition with the use of the words 'and still continuing' in respect of interest in the body of the notice and the words 'with further interest on $10,526.72 at the rate of 8% pa from 1 July 1988 to the date of final payment or of receiving and adjudication orders' in the particulars have the combined effect of not making what is demanded clear and can even be said to have misled the recipient.

Accordingly I hold that the notice to each of the two judgment debtors is bad and cannot be saved by s 131 and consequently the bankruptcy proceedings emanating from them are a nullity.

(The other 19 matters were also disposed of based on and applying the ratio decidendi herein.)

Petition dismissed.

Solicitors: *Lee & Lee.*

Reported by *PS Ranjan*

Winnie Young v William Lee Say Beng

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG 184 OF 1987
HAIDAR J
9 SEPTEMBER 1989

Family Law — Custody of infant — Parents separated — Infant staying with father and paternal grandparents — Application by mother for custody alleging change of circumstances — Presence of mistress and her children — Presence of insane sisters — Whether child would have difficulty adapting to new environment of change of custody ordered

The plaintiff and defendant were married in June 1979 and had a child in May 1980. The marriage did not seem to get off happily from the very beginning and the parties finally separated in the middle of 1981. The child was initially taken by the plaintiff to stay with her mother but was subsequently given to the care and custody of the defendant's parents who went to stay with the defendant in 1986. The defendant was then living with his mistress, a widow, who had two sons by her previous marriage. In July 1988, a baby boy was born to her and the defendant. The plaintiff applied for custody and maintenance of the child on 16 June 1987 alleging the following change of circumstances: (a) the child was not being well looked after as the defendant's father had to spend more time looking after his wife who had had a stroke; (b) the presence in the household of the defendant's two allegedly insane sisters; and (c) the presence in the household of the defendant's mistress and her two children who allegedly fought with the child. At the time of these proceedings, the marriage of the parties had yet to be dissolved.

Held, refusing the plaintiff's application:

(1) The 'immoral surroundings' issue is not necessarily the stringent rule in considering the custody of a child. In the present case, it was not simply a matter of the defendant taking a mistress as he would have married her but for the obstacle to the dissolution of his marriage to the plaintiff. Further, there was no evidence to question her character and she only began to stay with the defendant about a year after he had separated from the plaintiff.

(2) It is not necessarily the case that all stepmothers are incapable of giving the care and attention of the natural mother. In this instance, the child had been with the defendant's mistress for three years before she had her own child. In the court's opinion, she is a mature and responsible woman who could be a 'good mother' to the child. Further, the child himself said that he liked her as she treated him well.

(3) The plaintiff's allegation that the child was not well taken care of was not supported by the affidavits of the child's teacher and headmaster which in fact seemed to show otherwise.

(4) Not much weight should be attached to the presence of the sisters as there was neither medical evidence to support the nature of their mental illness nor evidence of their being of a violent character.

(5) In view of the conflicting expert opinions as to whether the child would have difficulty adapting to a new environment, it was best to test the same against the result of the interview with the child. In this case, the child stated that he did not wish to follow his mother as he was not used to her. This would tend to support that the change in environment would 'predispose the child to an increased risk of psychological as well as social malfunction in adult life'.